

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Improving Public Safety)	
Communications in the 800 MHz Band)	
)	WT Docket No. 02-55
Consolidating the 900 MHz Industrial/ Land Transportation and Business Pool Channels)	
)	
Commission Seeks Comment on <i>Ex Parte</i> Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding)	FCC 04-253
)	

To: The Commission

**COMMENTS OF CINERGY SERVICES, INC.
AND CONSUMERS ENERGY COMPANY**

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TABLE OF CONTENTS

	Page
I. BACKGROUND	2
II. THE FCC SHOULD ENFORCE THE SHORT-TERM INTERFERENCE ABATEMENT RULES	2
A. Nextel Has Not Presented Any New Facts Warranting a Modification of the Interference Abatement Rules.....	3
B. Nextel's Proposal Would Extend the Interference Problem for Several Years	5
III. NEXTEL'S OPERATIONS ON VACANT OR VACATED CHANNELS WOULD CAUSE UNACCEPTABLE INTERFERENCE	8
IV. THE FCC SHOULD RELY ON ITS EXISTING INTERPRETATION OF "GOOD FAITH" NEGOTIATIONS	10
A. Nextel's Proposed Clarification Contradicts the Purpose of the Rule.....	11
B. Nextel's Proposed Clarification Is Unnecessary	12

EXECUTIVE SUMMARY

Cinergy Services, Inc. and Consumers Energy Company, operators of extensive 800 MHz private land mobile radio systems, urge the FCC to approach Nextel's proposed "clarifications" with caution. As Critical Infrastructure Industry entities, Cinergy and Consumers require a smooth transition during the 800 MHz band reconfiguration to protect their safe and efficient delivery of electricity and natural gas and related energy products and services to the public.

Although Cinergy and Consumers hope that implementation of the rules and policies adopted in the *800 MHz Report and Order* will minimize harmful interference and disruption to their radio systems, they believe that some of Nextel's proposals would undermine the protections afforded to Critical Infrastructure Industry and other licensees. In particular, Nextel's proposals to delay the effective date of the new interference abatement rules and to operate on vacant and vacated channels during the reconfiguration process would expose incumbent licensees to an increased potential for interference. Cinergy and Consumers also support the FCC's existing definition of "good faith" negotiations, which provides flexibility that would not be available under Nextel's proposed bright-line rules, that would still require subjective assessment of each party's offers and counter-offers.

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AND CONSUMERS ENERGY COMPANY**

Cinergy Services, Inc., on behalf of its electric and gas utility affiliates, including The Cincinnati Gas & Electric Company and PSI Energy, Inc., (Cinergy) and Consumers Energy Company (Consumers), by and through their undersigned counsel, hereby submit these Comments in the above-captioned proceeding. In this proceeding, the FCC seeks comment on several *ex parte* presentations that requested clarification or modification of certain aspects of the *Report and Order*, *Fifth Report and Order*, *Fourth Memorandum Opinion and Order*, and *Order* (800 MHz *Report and Order*).¹ While the *ex parte*

¹ In re Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels; WT Docket No. 02-55, *Report and Order*, *Fifth Report and Order*, *Fourth Memorandum Opinion and Order*, and *Order*, 19 FCC Rcd 14969 (2004) [hereinafter *800 MHz Report and Order*].

presentations raise several issues, Cinergy and Consumers specifically oppose Nextel's proposals to suspend the new interference mitigation rules until after the reconfiguration of the 800 MHz band, operate on vacant and vacated channels during the reconfiguration process, and adopt a subjective definition of "good faith" negotiations.

I. BACKGROUND

Cinergy and Consumers operate extensive 800 MHz private land mobile radio systems to support their safe and efficient delivery of electricity and natural gas and related energy products and services to the public. Because of the importance of these communications systems to their Critical Infrastructure Industry (CII) activities, Cinergy and Consumers have taken an active interest in this proceeding from its inception. In their numerous comments and *ex parte* presentations, Cinergy and Consumers asked the FCC to prevent Nextel's operations from causing harmful interference to CII licensees and to avoid any disruption of CII radio systems while reconfiguring the 800 MHz band. Cinergy and Consumers are hopeful that the *800 MHz Report and Order* will lead to the accomplishment of those goals. Nextel's recent proposals, however, threaten to undermine the protections afforded CII and other licensees in the *800 MHz Report and Order*.

II. THE FCC SHOULD ENFORCE THE SHORT-TERM INTERFERENCE ABATEMENT RULES

The FCC should not suspend the effective date of the interference mitigation requirements adopted in the *800 MHz Report and Order*.² Although Nextel has proposed a Transition Period Interference Standard for the duration of the 800 MHz band reconfiguration, it has not presented any new facts supporting the adoption of this standard. The proposed Transition Period Interference Standard is also not in the public interest.

² *Id.* at 15021-15045 ¶ 88-141.

On September 28, 2004, Nextel filed an *ex parte* letter asking the FCC to adopt a "Transition Period Interference Protection Standard" that would apply during the band reconfiguration period in a National Public Safety Plan Advisory Committee (NPSPAC) region.³ The reduced interference protections requested by Nextel would (1) provide partial interference protection to a limited number of Public Safety radio channels in areas of high signal level; (2) continue use of the existing "Best Practices Guide" for non-Public Safety radio systems that meet minimum signal threshold standards and minimum receiver performance standards; and (3) recognize the use of voluntary interference mitigation agreements between CMRS licensees and 800 MHz licensees during band reconfiguration.⁴ Full interference abatement measures and standards would not take effect until the completion of band reconfiguration in a NPSPAC region.⁵

A. Nextel Has Not Presented Any New Facts Warranting a Modification of the Interference Abatement Rules

The FCC should not adopt Nextel's proposed Transition Period Interference Protection Standard because it has already considered and rejected all of the arguments raised by Nextel in favor of this interim standard. Under section 1.429 of the FCC's rules, a petition for reconsideration may be granted if it relies on new facts that (1) relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the FCC; (2) were unknown to the petitioner until after its last opportunity to present them to the FCC and could not have been discovered through

³ *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55 (Sept. 28, 2004).

⁴ *Id.* at 2-4.

⁵ *Id.* at 4.

the exercise of ordinary diligence prior to such opportunity; and (3) require consideration in order to serve the public interest.⁶

Nextel has not presented any new facts to support its request for a Transition Period Interference Protection Standard. In an *ex parte* letter, Nextel states that "[t]he signal strength specified in the *R&O* . . . was based on technical assumptions and solutions proposed by the Consensus Parties that are possible only after 800 MHz band reconfiguration is complete, and not during the reconfiguration transition process."⁷ These technical assumptions have not changed since their initial calculation and submission to the FCC on August 7, 2003.

In the *800 MHz Report and Order*, the FCC specifically recognized that "[t]he Consensus Parties envisioned that their unacceptable interference threshold provisions would go into effect only after band reconfiguration was complete."⁸ Despite possessing this information, the FCC still concluded that "*the severity of interference currently being encountered is such that we cannot responsibly let it go unaddressed in the interim.*"⁹

⁶ 47 C.F.R. § 1.429(b) (2003). Although Nextel has classified its *ex parte* presentation as a "clarification" of the *800 MHz Report and Order*, this request is effectively a petition for reconsideration of specific rule and policy decisions. The FCC quite deliberately adopted technical standards defining unacceptable interference and procedures for resolving interference cases, stating that these will be "the short-term vehicle by which we ensure a more effective response to the ongoing interference problem." *800 MHz Report and Order*, 19 FCC Rcd 14969 ¶ 3. Because Nextel has asked the FCC to reconsider its decision, Nextel should have to meet the appropriate burden.

⁷ *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55, 1 (Sept. 28, 2004).

⁸ *800 MHz Report and Order*, 19 FCC Rcd at 15039 ¶ 128.

⁹ *Id.* (emphasis added); *see id.* at 15028 ¶ 102 ("we cannot afford the luxury of awaiting completion of band reconfiguration . . . before we determine the conditions under which licensees are entitled to interference protection").

Nextel has also asserted that the Transition Period Interference Protection Standard is necessary because protecting 800 MHz licensees from unacceptable interference would require limiting the signal strength of its stations.¹⁰ In the *800 MHz Report and Order*, however, the FCC recognized that Nextel would have to accept certain "technical tradeoffs."¹¹ The FCC stated that "abating unacceptable interference using Enhanced Best Practices can sometimes be done only at the expense of affecting the coverage and subscriber capacity of ESMR and cellular systems," including the restriction of channel use and reductions in Effective Radiated Power.¹² Thus, Nextel has not presented any new facts to support the adoption of the Transition Period Interference Protection Standard.

B. Nextel's Proposal Would Extend the Interference Problem for Several Years

In any event, the FCC should reject the proposed Transition Period Interference Protection Standard as contrary to the public interest. The proposed standard would harm the public interest by compelling non-Public Safety systems (and many Public Safety systems) to continue enduring unacceptable interference from Nextel's operations for an extended period of time without recourse.

The proposed Transition Period Interference Protection Standard fails to include any significant protections for non-Public Safety systems, including those operated by CII licensees. In the *800 MHz Report and Order*, the FCC recognized the importance of CII radio systems for the protection of the nation's critical infrastructure and for "rapid

¹⁰ *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55, 2 (Sept. 28, 2004).

¹¹ *800 MHz Report and Order*, 19 FCC Rcd at 15035 ¶ 119.

¹² *Id.* at 15035-15036 ¶ 119.

response to major attacks that threaten Homeland Security."¹³ Because of these responsibilities, the FCC accorded CII licensees protections similar to those available to Public Safety licensees.¹⁴ Although Nextel has proposed modest interference protections for Public Safety radio systems under the Transition Period Interference Protection Standard, it has disregarded the FCC's policy decision to protect CII systems and has effectively asked to be absolved of any responsibility to protect such systems during the band reconfiguration. The FCC should not adopt or revise any rules on interference mitigation that do not provide Critical Infrastructure licensees with protections equivalent to those afforded Public Safety licensees.

Incumbent licensees could also have to endure unacceptable interference for three years after reconfiguration commences. In the *800 MHz Report and Order*, the FCC established only two deadlines for the completion of the reconfiguration: (1) within 18 months after the release of a Public Notice announcing the start date of reconfiguration of the first NPSPAC region, Nextel must complete retuning of Channels 1-120 in twenty NPSPAC regions, and (2) within 36 months of that Public Notice, Nextel must complete retuning nationwide.¹⁵ Other than these provisions, the *800 MHz Report and Order*

¹³ *Id.* at 14979 ¶ 13, 15040 ¶ 128. The FCC stated that "the very nature of the services offered by [CII] entities involves potential hazard to life and property and that CII entities often work hand in hand with public safety officials at the scene of an incident. Indeed, reliable CII radio communications have long proven essential in speeding recovery from natural or man-made disasters." *Id.* at 14974 ¶ 4 n.11.

¹⁴ For example, CII licensees are entitled to request and receive the same notices from ESMR and cellular telephone licensees as are Public Safety licensees. *Id.* at 15037-15038 ¶ 124.

¹⁵ *Id.* at 15130 ¶ 347.

contains no requirements or conditions compelling Nextel to complete the reconfiguration in a given NPSPAC region by any particular deadline.¹⁶

Although the FCC has established two deadlines, Nextel has effectively sought to create a single enforceable deadline nationwide. In an *ex parte* presentation, Nextel argued that it should be deemed to have met the 18 month benchmark if it clears all incumbents (other than Nextel and Southern LINC) from channels 1-120 in twenty NPSPAC regions and that it should not be compelled to relocate any NPSPAC systems or any of its own systems to meet this benchmark.¹⁷ Nextel also asked the FCC for the flexibility "to operate on all vacant or vacated channels below 817/862 MHz during the transition process."¹⁸ If the FCC were to grant these requests, Nextel will have an incentive to delay the completion of reconfiguration in any given NPSPAC region until just prior to the 36 month deadline in order to (1) retain the right to operate for as long as possible on an even larger number of 800 MHz channels than it controls today, and (2) delay for as long as possible the requirement to provide "full interference protection" to other 800 MHz licensees.

Thus, the FCC should decline to adopt the proposed Transition Period Interference Standard. While Nextel has not provided any evidence sufficient to grant its modification, the FCC should also not allow Nextel to hoard all the benefits of its band reconfiguration plan. This proposal would effectively absolve Nextel of any immediate duty to correct interference to CII licensees, despite the demonstrated importance of their systems. The

¹⁶ Although the Transition Administrator must provide the FCC with a schedule "detailing when band reconfiguration shall commence for each NPSPAC Region," *id.* at 15075 ¶ 201, the FCC has not required the Transition Administrator to specify a deadline for completing reconfiguration in any given NPSPAC region.

¹⁷ *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55, 1 (Sept. 21, 2004).

¹⁸ *Id.* at 1.

proposal would also largely preclude other non-Public Safety systems from enforcing their interference protections for, potentially, three years or more, even as Nextel simultaneously receives access to extremely valuable new spectrum.

III. NEXTEL'S OPERATIONS ON VACANT OR VACATED CHANNELS WOULD CAUSE UNACCEPTABLE INTERFERENCE

The FCC should refuse to allow Nextel to operate on all 800 MHz vacant or vacated channels below 817/862 MHz during the 800 MHz reconfiguration. Although Nextel did not provide much detail on this issue in its *ex parte* presentations,¹⁹ this request presumably renews the Consensus Parties' proposal that Nextel receive Special Temporary Authority (STA) to operate within the interference contour of incumbent licensees on channels 1-120 upon the commencement of rebanding in each Region.²⁰ This request also appears to expand the Consensus Parties' proposal to incorporate vacant or vacated channels in the interleaved spectrum at 809-817/854-862 MHz.

Nextel should not receive a blanket STA to operate on these channels because it would increase the potential for interference to incumbent licensees. Based on publicly available information, Nextel has not carefully constructed and operated its system to avoid interference, and there is little reason to believe it will operate more carefully if it has a blanket license and is largely exempt from complaints of interference during the reconfiguration process. For example, the FCC has initiated several enforcement actions

¹⁹ *Id.* at 5; *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55, 1 (Sept. 16, 2004).

²⁰ Supplemental Comments of the Consensus Parties, WT Docket No. 02-55, Appendix C-17 (Dec. 24, 2002).

against Nextel for unauthorized operations.²¹ Public Safety entities have also compiled a database documenting hundreds of occurrences of Nextel-caused interference.²²

Nextel has also failed to exercise caution when operating its system in many unreported situations. For example, Nextel caused harmful interference to Consumers by transmitting on channels in close proximity to a Consumers station in Macomb County, Michigan, in March of 2003. Although Nextel had a license to operate in Kalamazoo County, it commenced operations at a location on the opposite side of the state without checking for existing licensees. Because Nextel operated this station only seven miles from the Consumers station, Nextel's unauthorized operations basically shut down Consumers's critical communications.

A blanket STA is also inadvisable because it conflicts with the fundamental purpose of the 800 MHz reconfiguration, which is to reduce interference to high-site licensees by moving Nextel out of the portion of the band below 817/862 MHz. The FCC premised the entire 800 MHz band reconfiguration on Nextel's assertion that cellular and non-cellular architecture are incompatible.²³ Even though Nextel has openly admitted that

²¹ *E.g.*, In re Nextel Communications, Inc., File No. EB-00-OR-044, *Notice of Apparent Liability for Forfeiture* (Apr. 26, 2000) ("Nextel admitted that they had mistakenly programmed the wrong frequency into a transmitter at this location"); In re Nextel Communications, Inc., File No. EB-00-OR-027, *Notice of Apparent Liability for Forfeiture* (Apr. 25, 2000) (same). Nextel Partners has also demonstrated carelessness with its operations. In re Nextel WIP License Corp. Palehua Ridge, Hawaii, File No. EB-02-HL-078, *Notice of Apparent Liability for Forfeiture* (Sept. 30, 2002) (reporting that an FCC representative found that Nextel Partners caused "severe wide-band continuous interference" to a utility licensee's operations).

²² APCO, Project 39: Interference to Public Safety 800 MHz Radio Systems, *Interim Report to the FCC*, Dec. 24, 2001, *available at* http://www.apco911.org/afc/project_39/interim_report.pdf [hereinafter *Project 39 Interim Report*].

²³ *800 MHz Report and Order*, 19 FCC Rcd at 14973 ¶ 3.

it cannot operate its low-site, cellular architecture without causing interference to Public Safety and other high-site licensees, it seeks to operate on vacant and vacated channels below 817/862 MHz. If the FCC were to grant this request, Nextel could spread its interference-causing operations to spectrum and licensees that currently do not suffer from interference for up to three years after reconfiguration commences in a given NPSPAC region.

IV. THE FCC SHOULD RELY ON ITS EXISTING INTERPRETATION OF "GOOD FAITH" NEGOTIATIONS

The FCC should also decline to adopt Nextel's proposed clarification of the "good faith" negotiation requirement. In the *Report and Order*, the FCC stated that "[a]ll parties are charged with the obligation of utmost good faith in the negotiation process."²⁴

Although the FCC noted that it would determine whether good faith exists on a case-by-case basis by evaluating several factors,²⁵ Nextel asked the FCC to impose a bright-line rule.²⁶ Specifically, Nextel recommended clarifying that an incumbent would violate the good faith requirement if it "rejects Nextel's retuning offers without providing realistic counter-offers."²⁷

²⁴ *Id.* at 15076 ¶ 201.

²⁵ *Id.* ¶ 201 n.524. These factors include (1) whether the party responsible for paying the cost of band reconfiguration has made a bona fide offer to relocate the incumbent to comparable facilities; (2) the steps the parties have taken to determine the actual cost of relocation to comparable facilities; and (3) whether either party has unreasonably withheld information, essential to the accurate estimation of relocation costs and procedures, requested by the other party. *Id.*

²⁶ *Ex Parte* Presentation of Nextel Communications, Inc., WT Docket No. 02-55, 2 (Sept. 16, 2004).

²⁷ *Id.*

A. Nextel's Proposed Clarification Contradicts the Purpose of the Rule

The proposed clarification is contrary to the underlying purpose of the good faith negotiation requirement, which is to provide "a degree of flexibility that would not be achievable if we set rigid rules for the relocation process."²⁸ When the FCC initially adopted this good faith negotiation requirement in the *PCS/Microwave Relocation Order*, it stated that "the question of whether parties are negotiating in good faith typically requires consideration of all the facts and circumstances underlying the negotiations, and thus is likely to depend on the specific facts in each case."²⁹

Nextel should know that bright-line rules on the definition of "good faith" are inappropriate because the FCC denied a similar request in 2001. Although Nextel attempted to persuade the FCC to adopt certain presumptions of good and bad faith behavior for the 800 MHz Upper 200 relocation rules, the FCC found that "[d]eterminations of good faith necessarily are fact specific"³⁰ Thus, even though private licensees may have to provide substantive responses to Nextel in certain circumstances, the FCC should not adopt the proposed bright-line rule.

²⁸ *800 MHz Report and Order*, 19 FCC Rcd at 15077-15078 ¶ 201. "There is no 'one size fits all' rule that can be applied to the good faith issue, which is largely fact-dependent and likely to vary from case-to-case." *Id.* ¶ 202.

²⁹ In re Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8837 ¶ 20 (1996).

³⁰ In re Petition for Declaratory Ruling Concerning the Requirements for Good Faith Negotiations among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Band, PR Docket No. 93-144, *Memorandum Opinion and Order*, 16 FCC Rcd 4882, 4884 ¶ 4 (2001).

B. Nextel's Proposed Clarification Is Unnecessary

Clarification of the good faith requirement is also unnecessary because the FCC has already established a body of precedent on the definition of good faith.³¹ This requirement has not previously hindered Nextel's relocation of 800 MHz incumbent licensees. In 2001, Nextel informed the FCC that it has "successfully negotiated the relocation of approximately 1,000 incumbent site-based licensees" from the 800 MHz Upper 200 channels using good faith negotiations.³² Of these hundreds of licensees and negotiations, Nextel apparently failed to reach an agreement with only four licensees.³³

Nextel's proposed clarification of the good faith negotiation requirement is also overly subjective because it lacks any detail regarding what would constitute a "realistic" counter-offer. Although the FCC could describe the nature of a "realistic" counter-offer, the provision of such details would create rigid rules that the FCC has previously eschewed when interpreting the good faith negotiation requirement.

³¹ As mentioned above, the FCC has relied on the same definition of "good faith" negotiations for the 2 GHz and Upper 200 relocations. 47 C.F.R. §§ 101.73, 90.699 (2003).

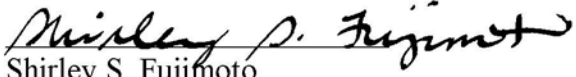
³² In re C&W Communications, Inc., File Nos. EB-02-IH-0643, EB-02-IH-0386, EB-02-IH-0681, *Memorandum Opinion and Order*, 19 FCC Rcd 4495, 4497 ¶ 4 n.19 (2004).

³³ *Id.* Even though Nextel asked the FCC to revoke the licenses of the four incumbents that had allegedly failed to negotiate in good faith, the FCC denied the request. *Id.* at 4495-4496 ¶ 1.

WHEREFORE, THE PREMISES CONSIDERED, Cinergy and Consumers respectfully request that the FCC consider these Comments and proceed in a manner consistent with the views expressed herein.

Respectfully submitted,

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